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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 78

BINGHAMTON CONSTRUCTION COMPANY, INCORPORATED, A CORPORATION,

Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

This is a cross-petition for writ of certiorari, filed in connection with the petititon of the Government, in "The United States, petitioner v. Binghamton Construction Co., Inc.", No. 794, filed this term to review the decision of the said Court in the above entitled cause, granting judgment to petitioner (hereinafter referred to as Plaintiff), for only a portion of its claim against The United States (hereinafter referred to as Defendant).

Opinion Below

The opinion of the Court of Claims of The United States was rendered on October 7, 1952, and is reported at 107 Fed. Supp. 712.

In Plaintiff's suit for Defendant's breach of the "Unit Price Contract" between said parties, for the construction of a flood Protection Project in the City of Elmira, New York, the Court of Claims awarded Plaintiff $7,363.22 of the damages of $15,597.38, claimed by reason of contract misrepresentations,—and denied in toto, both Plaintiff's claim to a balance of $14,785.55, due and payable for "Sheeting (including Shoring)" performed under Contract Item #7, and also, its claim for $6,934.26 for the additional cost of "Treating (the surfaces of) New Concrete Work" as directed by new and unanticipated specifications, issued nearly six months after the contract work commenced.

The Court of Claims denied Plaintiff's motion to amend said judgment to award Plaintiff additional sums aggregating $28,208.56,—or in the alternative, for a new trial; and also denied Plaintiff's renewal of said motion.

Jurisdiction

The order denying Plaintiff's said motion was made and entered on January 13, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1255.

Questions Presented

1. Whether the subject Contract was void *ab initio,* for Defendant's failure to comply with the mandatory provisions of the Davis-Bacon Act (49 Stat. 1011, 40 U.S.C., Secs. 276a, 276a-1), in that the rates specified in the Contract Schedule of Minimum Wages, were predicated upon an alleged field investigation and report to the Secretary of Labor, *by the War Department's District Engineer,* of wage rates prevailing in the Contract area,—rather than upon an investigation by the Labor Department itself, made in the manner prescribed by said Department's Regulation #503.

2. Whether, *having ruled* that errors in the "Minimum

Wage Schedule" issued by the Secretary of Labor on January 31, 1941 for incorporation in the subject Contract, constituted a positive contract misrepresentation "from the consequences of which the Defendant cannot be relieved"—*the Court of Claims erred* in refusing to measure Plaintiff's damages by the difference between said erroneous rates and *the increased wage rates that became effective on April 1, 1941 and admittedly were prevailing on June 3, 1941, when Defendant approved the Contract and work commenced thereon,* but instead, limited Plaintiff's recovery to the difference between said erroneous Contract rates and the wage rates prevailing in the Contract area, prior to the aforesaid increase of April 1, 1941, as set forth in a "Minimum Wage Schedule" issued by the Secretary of Labor on *March 4, 1941* for incorporation in another contract,—particularly since said "Minimum Wage Schedule" of March 4, 1941, contained the recital that the rates therein set forth were to be considered as prevailing in the Contract area for a maximum period of 90 days, and therefore, inviting bids on March 29th, in accepting Plaintiff's bid on May 14th, and in approving the subject Contract on June 3rd, 1941, Defendant knew, or should have known, that said Wage Determination would not be effective after June 2, 1941.

3. Whether, *having found* that for "Sheeting and Shoring" installed in trench excavations, to furnish the "lateral support" necessary to prevent the shifting of the ground beneath six (6) adjacent structures, Plaintiff was to be paid $.65 *for each square foot of area protected* by said "Sheeting"; and *having ruled* that the decision of Defendant's Contracting Officer as to what constituted the areas so protected, *was* not final and binding, under the rules expounded in *Wunderlich* v. *United States,* 342 U. S. 98,—*the Court of Claims erred* in approving Defendant's use of a formula for computing the "protected areas" for which Plaintiff was

paid, that omitted from said "protected areas", all "Sheeting and Shoring" installed in said trenches at levels lower than the bottom levels of said adjacent structures,—despite the fact that the furnishing of "lateral support" to the ground upon which said structures rested, only became necessary when Plaintiff's excavating operations reached and passed the ground level supporting each adjacent structure.

4. Whether *the Court of Claims erred* in rejecting Plaintiff's claim that it was underpaid for "Sheeting and Shoring" installed under Contract Item #7, in view of the fact that the evidence discloses that,—(1) that the parties were in agreement as to the Contract locations at which Sheeting and Shoring was installed, and (2) that Plaintiff was to be paid $.65 for each square foot of area protected thereby, and (3) that Plaintiff had fully disclosed the dimensions of length and heighth used in computing the "payment areas" claimed by it at each such location, and (4) that Defendant's Contracting Officer had failed and refused to reveal either during the progress of the work, or since the completion of the Contract, or at the trial of the action, the dimensions of length and heighth used in computing the reduced "payment areas" allowed and paid for at said Contract locations,—despite the implied obligation of the Contracting Officer for every "Unit Price" contract, to fully and frankly disclose to the contractor, the quantities allowed by him with respect to each Contract item.

5. *Whether the Court of Claims erred* in denying Plaintiff's claim for $6,070.19 for the added cost of complying with new and changed specifications issued on October 29, 1941, with respect to treatment of the exposed surfaces of new concrete structures to be erected in 1942, upon the ground that said new specifications were no more than the detailed instructions that Plaintiff should have anticipated

receiving to supplement the very general directions contained in the original specifications,—where (1) Article 3 of the subject Contract and paragraph 1-19 of the Specifications, direct that any changes made in the method of execution of the work, as called for by the original Specifications, resulting in additional cost to the contractor, entitle the contractor to receive additional compensation; and (2) both Plaintiff's experts and Defendant's Contracting Officer testified that the original Contract Specifications were sufficiently detailed, so that adherence to same would produce a satisfactory finish to the surfaces of all exposed concrete; and (3) said new specifications issued after the Contract had been in progress for five months, materially changed the method of treatment of said concrete surfaces, from that called for by the original Specifications, and provided for the use of three (3) materials not required by the original specifications.

6. *Whether the Court of Claims erred* in denying Plaintiff's right to recover as damages for Contract misrepresentations, the difference between the common labor wage rate of $.55 per hour, found to be prevailing in the Contract area by the Secretary of Labor's Wage Determination of March 4, 1941, and the wage rate of $.625 per hour prevailing for common labor, on and after April 1, 1941, upon the ground that Plaintiff failed to establish by adequate proof, that the Defendant had notice of said rate increase prior to issuance of invitations to bid on the subject Contract on March 29, 1941,—in view of the fact that when Plaintiff moved in said Court for the production by the Secretary of Labor, of proof establishing that he had knowledge of said rate increase many months prior to April 1, 1941, and the Defendant opposed said motion, upon the ground that Plaintiff was seeking to attack in a collateral proceeding, a final wage rate determination by the Secretary of Labor, in violation

of the rule expounded by this Honorable Court in *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, the Court of Claims denied Plaintiff's said Motion for Call, thereby itself barring the production of the very evidence that, in its decision, it held to be necessary to the proof of Plaintiff's claim.

Statute Involved

Act of August 30, 1935, 49 Stat. 1011 (U. S. Code, Title 40, Secs. 276a & 276a-1) commonly known as the Davis-Bacon Act, the pertinent portions of which direct that the advertised specifications for every Federal contract for public improvement costing in excess of $2,000.00, upon which mechanics and/or laborers are employed,—

> "shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics, which shall be based upon the wages that *will be determined by the Secretary of Labor, to be prevailing* for the corresponding classes of laborers and mechanics employed in projects of a character similar to the contract work, in the—civil subdivision of the State—in which the work is to be performed." (Emphasis added)

Departmental Regulation Involved

Labor Department Regulation 503 relates to the manner of compliance of the Labor Department of the Davis-Bacon Act, and may be briefly summarized as follows—

> SECTION 1—that all requests by Contracting Officers be referred to the Solicitor of Labor, who shall obtain the evidence for the Secretary's predetermination.
>
> SECTION 2—sets forth the rules for determining what wage rates are prevailing in any given area.
>
> SECTION 3—defines the preliminary information to be collected by the Solicitor from the department files.
>
> SECTION 4—provides, that if data on file is insufficient, the Solicitor shall appoint a referee to conduct a field investigation and report.

SECTION 5a—Lists as those who may be appointed referee, Labor Department employees, and also qualified persons not employed by the Labor Department, who are approved by the Secretary, but does not include in those eligible, any employee of the War Department.

SECTIONS 6 to 20 incl.—define the duties of the referee, the scope of the inquiry, the sources of information to be investigated, the holding of a public hearing, and the procedure with respect thereto, and instructions for the preparation of the referee's report.

SECTION 21—provides that this regulation supersedes all prior instructions.

SECTION 22—(not applicable to this case—did not become effective until 2/3/42).

Said Regulation 503 was prescribed by the Secretary of Labor, following the amendment on August 30, 1935, of the Davis-Bacon Act (Public Law No. 403, 74th Congress); became effective on September 30, 1935; and was in full force and effect in 1940 and 1941, when the subject contract was advertised and let.

Statement

The within suit arises out of a contract awarded to and executed by Petitioner on May 14, 1941, and approved and accepted by the Respondent on June 3, 1941, for the construction of a Flood Protection Project along the Chemung River within the City of Elmira, New York.

Plaintiff was awarded said Contract upon a bid based upon unit prices applied to the various operations involved in the performance of the work, aggregating the estimated sum of $232,669.30.

Work commenced on June 3, 1941 and the Contract was completed and accepted in December, 1942.

Promptly after commencement of work, Plaintiff protested a misrepresentation in the Contract, in that the Min-

imum Wage Schedule incorporated in the Contract specifications, that presumably represented the prevailing scale of wage rates in Elmira, was in error in two material respects, in that although the wage rate for Carpenters was shown to be $1.00 per hour and for Common Laborers, $.50 per hour, the respective prevailing rates for said wage classifications were $1.25 per hour and $.625 per hour. When Plaintiff's protest and demand for an adjustment of compensation were rejected by the Contracting Officer, and said rejection was affirmed by the Chief of Engineers, Plaintiff, upon completion of the Contract, asserted a claim for damages for said misrepresentation, in the sum of $15,597.38.

Also, during the progress of the work, Plaintiff was required to perform a large amount of trench excavation in close proximity to six privately owned structures immediately adjacent to the Contract site, and with respect to which it was repeatedly provided throughout the Contract specifications, that Plaintiff was chargeable for any and all damage caused to said structures during the life of the Contract. The Contract plans specified those locations on the Contract where sheeting and shoring must be installed for the protection of said structures and to furnish lateral support to the ground upon which same were located. The Contract specifications gave broad powers to the Contracting Officer to determine the adequacy of said protection, and to demand installation of Sheeting and Shoring at such other Contract locations where the use of same seemed necessary or advisable. The sheeting and shoring so installed was to be paid for at the rate of $.65 per square foot of area protected thereby.

Because of its continuing liability for the said six (6) adjacent structures until the completion of the Contract, Plaintiff raised no objection to the small sums allowed on account of this item of the work in the monthly partial esti-

mates, but upon the issuance of the final estimate, after completion of the work, and when all responsibility for said structures was ended, protested the inadequate allowance by the Contracting Officer for the Sheeting and Shoring installed, and demanded to be advised how the Contracting Officer had arrived at the total quantities allowed Plaintiff under said contract item.

The Contracting Officer failed and refused to reveal the computations by which he arrived at the total amount of 3,413.9 square feet allowed Petitioner, for the aggregate of the areas protected by the Sheeting and Shoring installed to safeguard the aforesaid (6) structures, and same have never been introduced into the record in this action to justify said allowance. Said Contracting Officer, without producing any figures in support thereof, asserted that he had employed a method of measurement that excluded any allowance to Plaintiff for Sheeting and Shoring installed in excavated areas below the bottom level of the adjacent structures, and therefore, and if, in fact, said formula was used, he has denied Plaintiff any compensation whatsoever for the Sheeting and Shoring that supplied the lateral support necessary to prevent disturbance of the ground upon which said adjacent structures rested. Accordingly, plaintiff has asserted a claim for that portion of the Sheeting and Shoring so excluded, amounting to $13,904.21.

The subject Contract called for the construction of an extended flood control wall, and construction of same was commenced on August 20, 1941.

Despite the fact that concreting operations were conducted under the strict supervision and direction of the Contracting Officer, and experimental changes in methods of operation were made from day to day, the sections of the concrete wall poured during the succeeding two months, continued to show unsatisfactory surfaces, until October 22,

1941, a few days prior to the shutdown of concreting operations for the winter, when the enrichment of the concrete design by increasing the percentage of cement therein, ordered by the Contracting Officer, finally produced concrete with satisfactory surfaces.

However, although said change of design meant an increase in cost to Defendant for the additional cement used, of only $.15 per cubic yard of concrete placed, the Contracting Officer nevertheless refused to continue to use said enriched mixture, but after two to three days of operations, and the close down for the winter, directed that when operations were resumed in the Spring of 1942, the original concrete design would be used, and the desired surfaces would be obtained by a more thoroughgoing treatment of the exposed surfaces, than was called for in the original Contract specifications.

On October 29, 1941 he issued detailed specifications for said surface treatment, to be used in finishing the surfaces of the concrete that would be erected in 1942.

Said new specifications drastically changed the original Contract specifications for the finishing of exposed concrete, and added two operations and three materials not previously required.

Said surface treatment, although eliminating the additional cost to Defendant of $.15 per cubic yard of concrete placed, that Defendant would have had to pay to obtain satisfactory surfaces by using the enriched concrete design referred to above, increased Plaintiff's cost in 1942 by more than $2.18 per cubic yard of concrete placed, and when the Contracting Officer refused to allow to Plaintiff its aggregate increased costs of $6,070.19 for finishing concrete placed in 1942, in accordance with said new specifications, said claim was added to the other items of damage asserted in this action.

Reasons for Granting the Writ

The instant case is noteworthy for the following questionable acts and practices that may establish dangerous precedents unless reviewed by this Honorable Court, to wit:

1. Defendant's Contracting Officer obtained on January 31, 1941, the Schedule of Minimum Wages incorporated in the subject Contract, that was not approved and accepted until June 3, 1941,—more than four (4) months later,—without endeavoring in the interim to bring said Wage Schedule up to date.

2. Said Wage Determination not only failed to comply with the requirements of the Davis-Bacon Act, because it was predicated upon an alleged investigation by the War Department District Engineer, rather than by the Secretary of Labor—but also, did not comply in any respect with the provisions of the Labor Department's Regulation #503, directing the manner in which such investigations were to be made.

3. The refusal of the Contracting Officer to produce for Plaintiff, or upon the trial, the computations resulting in the total quantity allowed Plaintiff under Contract Item #7, for Sheeting and Shoring installed, was arbitrary, unreasonable and a contemptuous rejection of the obligation of every public official to explain and justify his acts and decisions, and also a breach of his implied obligation to prove the quantities allowed by him on a "unit-price contract".

4. With respect to the "finishing" of exposed concrete surfaces,—the original Contract specifications prohibit *"the plastering over"* of said surfaces. The new and revised specifications issued after the Contract had been in progress five (5) months, include the direction that *"a thin sand-cement mortar shall be applied to the entire surface with a steel trowel.* We respectfully submit that such reversal of directions can only be regarded as a change in specifications, for which Plain-

tiff must be compensated pursuant to the provisions of Article 3 of the Contract.

5. A continued disregard by the Courts of such arbitrary contract violations as those enumerated above, must eventually result in the inability of Government agencies to obtain fair and reasonable bids for the construction of necessary public improvements.

Conclusion

WHEREFORE, plaintiff prays that a Writ of Certiorari be granted by this Court, directed to The Court of Claims of The United States, in order that this Court may review the questions presented herein.

Respectfully submitted,

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